IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

RICHARD WOOD, *

PETITIONER, *

vs. * NO. 75-5015

THE STATE OF OHIO, *

RESPONDENT. *

* * * * * * * * * * * * * * *

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

* * * * * * * * * * * * * * *

COUNSEL FOR RESPONDENT

RONALD L. COLLINS
Prosecuting Attorney
Tuscarawas County
Court House
New Philadelphia, Ohio 44663

COUNSEL FOR PETITIONER

JAMES R. WILLIS, ESQ.
1212 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114

I. QUESTIONS PRESENTED FOR REVIEW.

1. Can an accused or his accomplice-witness take the stand as witnesses at trial and commit perjury with impunity from confrontation with prior inconsistent statements and acts?

2. Where an oral statement made by a defense witness is unknown to the Prosecutor at the time discovery was requested by the defendant, is it reversible error to introduce this statement for the limited purpose of attacking the credibility of the defense witness?

3. Does a Trial Court abuse his discretion when he refuses to charge the jury that a paid informant's testimony should be examined with greater than ordinary scrutiny?

II. STATEMENT OF THE FACTS OF THE CASE.

A. PROCEEDINGS BELOW.

The petitioner was originally convicted of sale of an hallucinogen by a jury in the Common Pleas Court of Tuscarawas County, Ohio, on October 9, 1973.

The Ohio Fifth District Court of Appeals subsequently affirmed the conviction, and the Ohio Supreme Court denied defendant's appeal.

This matter is before this Court on the petition for certiorari by the defendant below.

B. THE FACTS OF THE OFFENSE.

On April 28, 1973, the Multi-County Narcotics Bureau, which operates in Tuscarawas County, Ohio, among other counties,

received word from one of its informants that he had set up a deal to purchase 10 pounds of marijuana from the defendants. The defendants wanted $175.00 a pound, or $1,750.00 for the 10 pounds.

There was a frantic rush to gather the money in time. Only $1,320.00 could be gathered, but this amount was photocopied so that the serial numbers of the bills could be recorded.

The informant was given the money and went off to his rendezvous at the Cloverleaf Bar on West Third Street in Dover, Ohio. There he met the defendants. Since the Cloverleaf Bar was too crowded to talk business, they went across the street to another bar where the bargain was struck.

(It should be noted that this statement of facts refers to defendants since two men were involved and charged on the same set of circumstances, although the case arrives here with a single defendant because each was tried and convicted separately.)

The defendant Doyle then went to get the marijuana while the defendant Wood stayed with the informant who drove to the nearby city of New Philadelphia, eventually winding up behind a bar called the 224 Club. The informant pulled his vehicle into the parking lot of the 224 Club after receiving a signal from the defendant Doyle who flashed his headlights on and off.

The exchange took place at this location. The defendants gave the informant the marijuana, and he gave them the money.

Now during this entire time, the defendants and the informant were under surveillance by a group of law enforcement officers--some from the Multi-county Narcotics Bureau and some from the Dover Police Department, the New Philadelphia

Police Department, and the Tuscarawas County Sheriff's Department. One of these officers, Captain--now Chief--Griffin, of the Dover Police Department, saw the transfer in the parking lot of the 224 Club and testified at trial to that effect.

When the defendants were picked up, they were asked to give consent to have their car searched, but refused. Then police officers secured a search warrant and, sure enough, there was the money which had been photocopied under the floor mat on the passenger side.

C. TRIAL.

Thus, the task of the defense at trial became threefold. 1) It had to undermine the credibility of the State's eyewitness--the informant. 2) It had to undermine the credibility of any witness who tended to back up the testimony of the defendant--specifically Chief Griffin. 3) It had to explain the money.

At trial, the defendants concocted a story about a frame, that the informant had, unknown to them, thrown the money into the back seat, and that they were chasing around trying to return the money to him at the time that they were arrested. How did they explain what they were doing in the company of the informant anyway on that evening? Oh, they were trying to buy marijuana, not <u>sell</u> it.

The Trial Court instructed the jury:

> Now, ladies and gentlemen of the jury, you are the sole judges of the facts, the credibility of the witnesses, and the weight of the evidence.
>
> To weigh the evidence, you must consider the credibility of each witness. You will apply the tests of truthfulness which you apply in your daily lives.

> These tests include the appearance of each witness upon the stand; his manner of testifying, the reasonableness of the testimony; the opportunity he had to see, hear, and know the things concerning which he testified; his accuracy of memory; frankness or lack of it; intelligence, interest, and bias, if any, together with all the facts and circumstances surrounding the testimony. Applying these tests, you will assign to the testimony of each witness such weight as you deem proper.
>
> You are not required to believe the testimony of any witness simply because he was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief.

At trial, two separate juries disbelieved the story of the defendants and refused to find the informant and Chief Griffin impeached witnesses by convicting each of the defendants.

III. SUMMARY OF THE ARGUMENT.

The respondent respectfully submits that this case does not present to this Court those special and important reasons as set out in Rule 19 of the Supreme Court Rules for which a petition for certiorari should be granted.

The extensive quotations from the record in petitioner's brief clearly show that the case is presented here chiefly on a weight-of-the-evidence argument. Surely such matters as credibility of witnesses and resolution of disputed testimony are not those weighty matters with which this Court should concern itself.

The petitioner does argue that the Ohio courts have decided a federal question of substance, but even if that is so, respondent submits that this Court has already ruled authoritatively on the issue, and that the Ohio decisions below are in accord with this Court's applicable decisions.

IV. ARGUMENT.

A. CROSS-EXAMINATION OF A DEFENDANT AS TO HIS PRIOR INCONSISTENT ACTS.

The petitioner apparently contends that the Trial Court committed reversible error by allowing the State to cross-examine the defendants about their inconsistent conduct at the time of their arrest after they took the stand and claimed innocence because they had been framed.

The respondent answers that Harris v. New York, 401 U.S. 222 (1971) is determinative. At page 225 the Court said:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury...Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately and the prosecution here did no more than utilize the traditional truthtesting devices of the adversary process...
>
> The shield provided by Miranda cannot be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances. (Emphasis added)

The respondent also commends to this Court other well-reasoned, though only persuasive, authority to the same effect. United States ex rel. Burt v. New Jersey, 475 F2d 234 (3rd Cir.

1973); United States v. LaVallee, 471 F. 2d 123 (2nd Cir. 1972); United States v. Ramirez, 441 F. 2d 950 (5th Cir. 1971) Cert. den. 404 U.S. 869; United States v. Russell, 332 F. Supp. 41 (E.D. Pa. 1971); Johnson v. People, 473 P. 2d 974 (Colo. 1970).

B. DISCOVERY.

Petitioner's contention here appears to be that the Trial Court committed reversible error when it permitted the State to cross-examine the defendant Doyle (appearing as a defense witness in the defendant Wood's case) about an oral statement he made to Narcotics Agent-in-Charge Beamer after his arrest, and to call Beamer on rebuttal to testify to his version of the same discussion.

The respondent wonders out loud whether this discretionary matter satisfies this Court's jurisdictional requirements. However...

Rule 16 of the Criminal Rules, in pertinent part says:

> Upon motion of the defendant, the Court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any of the following which are available to, or within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known to the prosecuting attorney;...
>
> (ii) Written summaries of any oral statement, or copies thereof, made by the defendant or co-defendant to a prosecuting attorney or any law enforcement officer.

The petitioner further apparently contends that this part of Rule 16 entitles him to a reversal of his conviction.

The State replies that 1) no written summary of the oral statements of the defendant-witness Doyle ever existed and 2) even if the defendant was entitled in some way to discovery of the non-transcribed oral statements of the defendant-witness Doyle, the Trial Court, in a proper exercise of his broad discretion under Rule 16, gave all the relief the defendant-appellant was entitled to with a cautionary instruction.

Rule 16 (E) of the Criminal Rules goes on to say:

> (E) Regulation of Discovery...
>
> (3) Failure to Comply. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances. (emphasis added)

Here, the record shows that the Trial Court immediately gave the jury a cautionary instruction that the testimony of Beamer concerning the conversation with the defendant-witness Doyle was to be used only to test the credibility of the defendant-witness Doyle who had already testified to his version of the conversation.

The record is clear that the Prosecuting Attorney had no knowledge of the oral statement at the time he made his written reply in discovery. So even if he was under some duty to disclose these oral statements, which the respondent contends he is not, his response was correct at the time he made it.

C. REQUESTED SPECIAL INSTRUCTION AS TO CREDIBILITY OF WITNESSES.

Petitioner next contends that he was entitled to a special cautionary instruction as to the credibility of the informant who testified at trial.

Respondent answers first by disputing petitioner's claims that the informant was a drug addict and that his testimony was uncorroborated. The record clearly shows the informant's testimony was corroborated.

But even if the record did show that the informant was a drug addict and his testimony was uncorroborated (which respondent disputes), then there would be no binding rule of law

which required the Ohio Trial Judge to give the jury a special cautionary instruction beyond the proper general charge on credibility as set out in the statement of facts within this brief above.

In Ohio, it is not the province of the Court to classify witnesses, and give to the jury what the experience of the Courts may be in respect to such a class, but their credibility should be left to the jury, under all the competent facts and circumstances of the case before it. State v. Tuttle, 67 Ohio St. 440 (1902).

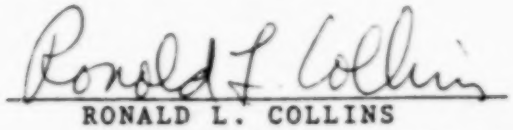
Many states have similar rules.

it seems strange to the respondent that such a discretionary matter as this could be the subject of a question decided by the Supreme Court of the United States. In order to do so, the Court would have to find, it seems to us, that a trial judge, as a matter of law, is constitutionally mandated by a criminal due process requirement to give a special cautionary instruction on the credibility of certain witnesses. The absurdity of such a rule is apparent by its recital.

V. CONCLUSION.

The respondent believes he is entitled to have the petition for a writ of certiorari denied. The petitioner received a fair trial. The Trial Court committed no error of constitutional, or even prejude. The matters which petitioner present do not show special and important reasons for review in the Supreme Court of the United States.

Respectfully submitted,



RONALD L. COLLINS
Prosecuting Attorney
Tuscarawas County
Court House
New Philadelphia, Ohio 44663

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of July, 1975, a copy of the foregoing Brief of Respondent in Opposition to Petitioner's Petition for a Writ of Certiorari was mailed, postage prepaid, to James R. Willis, Esq., Attorney at Law, 1212 Bond Court Building, 1300 East Ninth Street, Cleveland, Ohio, 44114, and to William J. Brown, Attorney General of Ohio, Suite 202, 48 E. Gay Street, Columbus, Ohio. I further certify that all parties required to be served have been served.

Ronald L. Collins

RONALD L. COLLINS
Prosecuting Attorney
Tuscarawas County
Court House
New Philadelphia, Ohio 44663